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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA JAHUE NASH,

Defendant and Appellant.

C056743

(Super. Ct. No.
06F03216)

A jury convicted defendant Joshua Jahue Nash of attempted murder (Pen. Code, §§ 664/187, subd. (a); undesignated section references are to the Penal Code; count one) and assault with a firearm (§ 245, subd. (a)(2); count two). In connection with count one, the jury found true the allegations that defendant was 16 years of age or older at the time of the offense (Welf. & Inst. Code, § 707, subd. (d)(1)), personally used a firearm (§ 12022.53, subd. (b)), personally discharged a firearm (§ 12022.53, subd. (c)), and personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). In connection with count two, the jury found true the allegations that defendant personally used a firearm (§ 12022.5, subd. (a))

and personally inflicted great bodily injury (§ 12022.7, subd. (a)).

Sentenced to state prison for an aggregate term of 32 years to life, defendant appeals, contending insufficient evidence supports the enhancement for personally discharging a firearm causing great bodily injury attached to count one and the enhancement for personally inflicting great bodily injury attached to count two. Defendant also contends his right to due process was violated in that the instruction and the prosecutor's argument on what constituted great bodily injury permitted the jury to decide the foregoing enhancements on a legally inadequate theory. He also challenges the instructions on the enhancements with respect to the definition of causation and the list of what constitutes great bodily injury. We will affirm the judgment.

FACTS¹

On March 12, 2006, as Michael Madison returned home from work, he saw one man in the street and another man, defendant, go into Madison's house. After Madison parked his car and got out, defendant ran up to Madison, raised a shotgun and, from 10 feet or less, shot Madison. Madison was hit in the leg and arm. Defendant fled. Madison, in pain, was taken to the hospital by ambulance. Dr. Hunter Greene, an orthopedic surgeon, performed

¹ Defendant does not challenge the evidence with respect to his identity as the shooter and we will not recount that evidence here.

surgery on Madison's left knee which had two shotgun pellets, one near the capsular junction in soft tissue outside the knee joint and the other in the knee joint. Each pellet measured two millimeters in diameter.

The injury to the knee caused by the pellet in the knee joint required surgery. Dr. Greene testified: "The knee joint is normally sterile. Anything that enters from the outside to the inside increases the risk for infection, and also the big metal bead in the knee can cause damage to the cartilage." Dr. Greene stated that surgery was required to remove the pellet which was about two centimeters below the skin. He explained: "Not necessarily the pellet itself, but the injury to the knee. It needed to be irrigated or flushed out to decrease the risk of any infection. [¶] It doesn't eliminate the risk, but it decreases the risk of possible infection from the foreign material brought in from the outside, and the pellet would be removed at the same time."

The surgery required incisions around the area where the pellets entered the knee. Fluid through the incisions forced the pellet out of the knee. About 15 stitches and less than 20 staples were used to close the incisions. A drain was inserted and removed the day after surgery.

Even though there was no injury to a tendon, ligament, major artery or vital organ, Dr. Greene explained that the pellet needed to be removed: "[Madison] was at risk for infection. That infection can cause systemic illness. If it's left untreated, it can cause damage to the articular cartilage.

[¶] If it didn't cause infection, the pellet was still there, the pellet, as he walked and moved his knee, would have likely worn away the articular cartilage causing essentially early arthritis."

Two pellets in Madison's forearm were located in the subcutaneous tissue, just below the skin, and were considered superficial. While Madison believed he received stitches in his arm, Dr. Greene testified that no suturing was required.

Madison was hospitalized for three or four days, left the hospital on crutches, required physical therapy for his leg, was off work for about three weeks, was prescribed pain medication, and returned to the hospital two weeks after his release to have staples removed from the knee.

DISCUSSION

I

Defendant first challenges the sufficiency of the evidence to support the enhancements under sections 12022.53, subdivision (d), and 12022.7, subdivision (a). We conclude more than sufficient evidence supports these enhancements. On this record, defendant's argument borders on the frivolous.

In reviewing a challenge to the sufficiency of the evidence, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond

a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Section 12022.53, subdivision (d), applies to "any person who, in the commission of a felony specified in subdivision (a), . . . personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, . . . to any person other than an accomplice."²

² The trial court instructed the jury in the modified language of CALCRIM No. 3150 as follows:

"If you find the defendant guilty of the crime charged in Count One, you must then decide whether the People have proved the additional allegations that the defendant personally and intentionally discharged a firearm during that crime, within the meaning of . . . section 12022.53(c) and, if so, whether the . . . defendant's act caused great bodily injury, within the meaning of . . . section 12022.53([d]).

"To prove that the defendant intentionally discharged a firearm, the People must prove that, one, the defendant personally discharged a firearm during the commission of that crime; two, the defendant intended to discharge the firearm.

"If the People have proved both one and two, you must then decide whether the People have also proved that the defendant's act caused great bodily injury to a person.

"A firearm is any device designed to be used as a weapon from which a projectile is discharged or expelled through a barrel by the force of an explosion, or other form of combustion.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"Such an injury may include, but is not limited to, loss of consciousness, concussion, bone fracture, prolonged loss or impairment to any bodily member or organ, a wound requiring extensive suturing, and serious disfigurement.

Section 12022.7, subdivision (a), applies to "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony" Section 12022.7, subdivision (f), defines great bodily injury as "a significant or substantial physical injury."³

"An act causes great bodily injury when the injury is the direct, natural and probable consequence of the act, and the injury would not have happened without the act.

"A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.

"In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

"The People have the burden of proving each of these allegations beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

³ The trial court instructed the jury in the modified language of CALCRIM No. 3160 as follows:

"If you find the defendant guilty of the crime charged in Count Two, you must then decide whether the People have proved the additional allegation that the defendant personally inflicted great bodily injury on Michael Madison during the commission of that crime, within the meaning of . . . section 12022.7(a).

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"Such an injury may include, but is not limited to[,] loss of consciousness, concussion, bone fracture, prolonged loss or impairment to any bodily member or organ, a wound requiring extensive suturing, and serious disfigurement.

A significant or substantial injury for purposes of section 12022.7 does not require that "the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of body function," but only an injury "beyond that inherent in the offense itself." (*People v. Escobar* (1992) 3 Cal.4th 740, 746-747, 750 (*Escobar*).)

"Whether the harm resulting to the victim of a [crime] constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.' [Citation.] . . . 'A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description. Clearly it is the trier of fact that must in most situations make the determination.' [Citation.]" (*People v. Wolcott* (1983) 34 Cal.3d 92, 107 (*Wolcott*).)

Initially, we note that defendant does not challenge the evidence showing that he personally and intentionally discharged a firearm during the commission of count one (attempted murder). (§ 12022.53, subd. (c).) For purposes of section 12022.53, subdivision (d), he challenges the evidence showing that his act "cause[d] great bodily injury." For purposes of section

"The People have the burden of proving each allegation beyond a reasonable doubt. [¶] If the People have not met this burden, you must find that the allegation has not been proved."

12022.7, subdivision (a), he challenges the evidence showing that he “personally inflict[ed] great bodily injury” during the commission of count two (assault with a firearm). Defendant argues that the evidence showed only “a *risk of future* physical injury” and did not constitute physical injury that was substantial and significant. Defendant focuses on the surgeon’s testimony that the pellet which lodged in the knee joint had not damaged a tendon, ligament, major artery or vital organ. Defendant claims the pellet posed only a risk of future infection and cartilage wear and tear. Defendant argues the surgical incisions and subsequent suturing do not qualify as great bodily injury inflicted during the offense nor were the same “personally inflicted by the defendant.” In his reply brief, defendant claims the recent case of *People v. Cross* (2008) 45 Cal.4th 58 (*Cross*) supports his position.

In *Cross*, a jury convicted the defendant of, inter alia, a nonforcible violation of section 288, subdivision (a), and found that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). (*Cross, supra*, 45 Cal.4th at p. 63.) The defendant impregnated his stepdaughter who obtained an abortion with the defendant’s encouragement. (*Id.* at pp. 61-62.) *Cross* rejected the defendant’s contention that “a pregnancy without medical complications . . . can never support a finding of great bodily injury.” (*Id.* at pp. 63-66.) *Cross* found that the evidence of the pregnancy under the circumstances supported the great bodily injury finding. (*Id.* at p. 66.) *Cross* determined that the trial court’s error in instructing that an abortion could also

constitute great bodily injury (defendant did not "personally" perform the abortion) was a technical error. (*Id.* at pp. 66-67.) *Cross* also rejected the defendant's claim that the prosecutor's arguments misled the jury to conclude that in facilitating the abortion, the defendant personally inflicted great bodily injury. (*Id.* at pp. 67-69.) In discussing the meaning of great bodily injury, *Cross* stated: "Proof that a victim's bodily injury is 'great' -- that is, significant or substantial within the meaning of section 12022.7 -- is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury. [Citations.]" (*Cross, supra*, 45 Cal.4th at p. 66.) *Cross* supports the jury's findings here.

Madison suffered pain from the injuries caused by the shotgun pellets, was hospitalized, and had surgery on his knee to remove a shotgun pellet in the knee joint. Dr. Greene explained that the knee joint is "normally sterile" and that "[a]nything that enters from the outside to the inside increases the risk for infection." In addition, if left in the knee, the pellet could cause "damage to the cartilage." Dr. Greene stated that surgery was required to "irrigate[] or flush[] out [the injury] to decrease the risk of any infection." Dr. Greene also stated that the pellet needed to be removed because Madison "was at risk for infection," which "can cause systemic illness" and "[i]f it's left untreated, it can cause damage to the articular cartilage"; if the pellet was not removed, it "would have likely

worn away the articular cartilage causing essentially early arthritis."

The surgery required incisions, the pellet was forced out by fluid through the incisions, stitches and staples were used to close the incisions, and a drain was inserted. Madison was hospitalized for several days and left the hospital on crutches. He required physical therapy for his leg, was off work for about three weeks, and returned to the hospital to have staples removed from the knee. Madison's injuries were substantial and "beyond that inherent in the offense itself." (*Escobar, supra*, 3 Cal.4th at pp. 746-747.)

Findings of infliction of great bodily injury have been upheld in cases where the victim has suffered a similar injury. (*Wolcott, supra*, 34 Cal.3d at p. 107 [victim shot in calf, tearing muscle tissue; bullet fragments in arms and legs, only one fragment removed; victim needed no stitches, lost little blood, was released after treatment, and worked the following day; no permanent disability but arm sore to touch]; *People v. Le* (2006) 137 Cal.App.4th 54, 57-60 [bullet traveled from the victim's left leg to right thigh; victim suffered soft tissue and muscular injury to both legs; bullet removed with surgery; victim released from hospital in 24 hours and had difficulty thereafter in bodily function]; *People v. Mendias* (1993) 17 Cal.App.4th 195, 200-201, 205-206 [bullet in victim's thigh resulted in pain, temporary inability to walk, and overnight hospital stay; bullet was not removed and was not painful when it moved]; *People v. Lopez* (1986) 176 Cal.App.3d 460, 461-462,

463-465, & fn. 5 [one victim shot in buttocks, fell to ground, disoriented and screamed; another victim felt pain when shot in thigh, bullet went in and out the thigh; no evidence that either victim sought or received medical treatment.)

"[T]he meaning of the statutory requirement that the defendant *personally inflict* the injury does not differ from its nonlegal meaning. Commonly understood, the phrase 'personally inflicts' means that someone 'in person' [citation], that is, directly and not through an intermediary, 'cause[s] something (damaging or painful) to be endured' [citation]." (Cross, *supra*, 45 Cal.4th at p. 68.) Defendant shot the shotgun. He does not claim otherwise. Pellets from the shotgun blast caused injuries to Madison. Two pellets struck Madison's arm and two pellets struck Madison's leg. The injury to the knee joint *required* surgical intervention to remove the pellet. Unlike the elective abortion in Cross, the surgery here was required to treat or repair the injury. The evidence supports the finding that defendant "personally" inflicted Madison's injuries.

Section 12022.53, subdivision (d), requires proximate cause and the jury was instructed accordingly as follows: "An act causes great bodily injury if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence." (Italics omitted.)

But for defendant's shooting the shotgun at Madison, Madison's injuries would not have been inflicted and required surgical intervention, pain medication, time off from work, physical therapy, etc. Sufficient evidence supports the enhancements under sections 12022.53, subdivision (d), and 12022.7, subdivision (a); there was no due process violation.

II

Defendant next challenges the prosecutor's argument and the modified instruction given with respect to the enhancements. We find no reversible error.

In connection with the enhancements attached to count one (§ 12022.53, subds. (c), (d)), the trial court instructed the jury in the modified language of CALCRIM No. 3150, in relevant part, as follows: "Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] *Such an injury may include, but is not limited to, loss of consciousness, concussion, bone fracture, prolonged loss or impairment to any bodily member or organ, a wound requiring extensive suturing, and serious disfigurement.*" (Italics omitted; second italics added.) In connection with the enhancement attached to count two (§ 12022.7, subd. (a)), the trial court gave a modified version of CALCRIM No. 3160, which included the same italicized language above as in CALCRIM No. 3150. The italicized language, included at the prosecutor's request and with no objection from defense counsel, originates from section 243, subdivision (f)(4), which defines "serious bodily injury" to mean "a serious impairment of

physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement."

During closing argument, the prosecutor argued: "How do we know that caused great bodily injury? We know because some of the things that Dr. Greene testified to are on that list." The prosecutor argued that one of the pellets required surgery which necessitated two incisions and the wound required 15 internal sutures and 20 external staples, "clearly, extensive suturing, clearly GBI." The prosecutor noted the length of Madison's hospital stay, time off work, and prolonged impairment to his leg. Defense counsel argued that the "two millimeter" pellet was removed to "minimize the risk of infection" and "did not cause . . . the fifteen internal [sutures] and twenty external staples." The prosecutor responded: "Finally, the great bodily injury. [Defense counsel] argued to you the only reason why they had to do surgery was to eliminate the risk of infection to Mr. Madison. [¶] Ladies and Gentleman, why are we here? The only reason why they had to do surgery was not because of the infection, but because [defendant] shot Mr. Madison in the first place. [¶] The fact that he had to have surgery, he had to have his knee irrigated to get that pellet out, the fact that he had to suture his knee up and staple his leg together, the fact that Mr. Madison spent three days in the hospital and three weeks off of work, was all because of one act: And that is what

we're talking about when we're talking about causing great bodily [injury]."

Initially, we note that defense counsel did not object to the modified language of either instruction or to the prosecutor's argument. Any claim of prosecutorial misconduct is forfeited by defendant's failure to object. (*People v. Lancaster* (2007) 41 Cal.4th 50, 81-82; *People v. Gray* (2005) 37 Cal.4th 168, 215.) We review the merits of defendant's claims of instructional error only to the extent they affect his substantial rights. (§ 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247.) We find no reversible error.

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights. In making this determination we consider the specific language under challenge and, if necessary, the instructions as a whole." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.)

"[T]he original version of section 12022.7" which "never became law" included a definition of great bodily injury similar to the definition of serious bodily injury found in section 243, subdivision (f). (*Escobar, supra*, 3 Cal.4th at p. 747.) Instead, section 12022.7's definition was then and still is a broader or more general definition. (*Id.* at pp. 747-750.) "Great bodily injury" and "serious bodily injury" are

essentially equivalent but "there are some differences in the statutory definitions." (*People v. Knoller* (2007) 41 Cal.4th 139, 143, fn. 2.)

The challenged instructions somewhat narrowed that which is required by the statutory definition of "great bodily injury" thereby allowing for the possibility that the jury would construe the term as meaning something on the list or something similar to that on the list in view of the qualifying language used, that is, "may include but is not limited to." But the list itself did not incorrectly define great bodily injury, just somewhat narrowed the definition. Defendant's substantial rights were thus not affected. Moreover, defense counsel argued that "great bodily injury is used synonymously with the word serious bodily injury." She also argued that even if the jury found any of the listed items, the jury still had to decide it constituted great bodily injury. Defendant does not raise an ineffective assistance of counsel claim and rightly so since the instructions were to his benefit.

Defendant claims that the surgical incisions and suturing could not constitute great bodily injury in the commission of the felony and the prosecutor's reliance upon such theory was a legally inadequate theory. Defendant argues the causation language allowed the jury to make the finding on a legally inadequate theory in that the surgical incisions and suturing did not occur in the commission of the felony. But defendant also argues that causation did not apply because it was undisputed that the pellets came from a single gun. Defendant

asserts there is nothing in the record which reveals the jury's basis for its true findings on the enhancements.

We reject all of these arguments. Defendant does not point out where in the record he conceded causation or requested modification of the instruction to delete causation. Defendant misplaces his reliance upon several cases: *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 ["for purposes of section 12022.5, the use of a firearm during escape from the crime scene is a use during the commission of the crime"]; *People v. Morgan* (2007) 42 Cal.4th 593, 611-613 [a kidnapping case concerning what constituted a substantial distance for asportation; law at time of offense with respect to the number of feet rendered one of the prosecutor's theories legally inadequate]; and *People v. Zacarias* (2007) 157 Cal.App.4th 652, 655-661 [kidnapping for financial gain based on three different theories, one of which was legally deficient (no crime of alien transportation under California law)]. These cases do not apply here as all are distinguishable. As Cross stated, proof of great bodily injury is established by evidence of "the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury." (*Cross, supra*, 45 Cal.4th at p. 66.) Defendant's act of shooting pellets into Madison caused great bodily injury, that is, a significant or substantial physical injury, not a trivial or minor injury, as evidenced by the pain Madison suffered, his impairment for weeks, and the surgical intervention which was required, not elective. The prosecutor's reliance upon such evidence was

proper and such evidence supports the jury's findings as previously discussed.

Defendant claims that there was no evidence that the pellet-inflicted wound required extensive suturing. Defendant misplaces his reliance upon *People v. Nava* (1989) 207 Cal.App.3d 1490, 1494-1499 (*Nava*) [the trial court erroneously instructed that a bone fracture was a significant and substantial injury as a matter of law].

Dr. Greene testified that the pellet in the knee joint required surgery. The surgery necessitated incisions, through which fluid forced the pellet out, and sutures and staples to close the incisions. The surgery was required to "treat or repair the injury" caused by the pellet shot into the victim by defendant. Unlike the court in *Nava*, the trial court here did not instruct that a pellet-inflicted wound requiring extensive suturing was a significant or substantial physical injury as a *matter of law*.

Defendant argues the challenged instructions lowered the prosecutor's burden of proof, deprived him of his right to have the jury determine every element of the enhancement, violated due process and was prejudicial. If anything, the more detailed definition increased the prosecutor's burden of proof. There is no reasonable likelihood that the jury understood the instructions in the manner claimed. We find no due process violation.

DISPOSITION

The judgment is affirmed.

SIMS, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.